IN THE
Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-211

ROBERT CLIFTON MARLER,
Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,
Respondent.

OPPOSITION OF RESPONDENT TO PETITION FOR WRIT OF CERTIORARI

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TOPICAL INDEX

TABLE OF AUTHORITIES

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PROCEEDINGS BELOW

A misdemeanor complaint was filed on behalf of respondent by the City Attorney of San Diego charging petitioner with a violation of California Penal Code section 311.2(a) on February 24, 1976. A jury returned a verdict of guilty on September 1, 1976. Judgment of conviction was entered on December 13, 1976, by Judge Carlos A. Cazares of the Municipal Court of San Diego Judicial District.

The Appellate Department of the Superior Court of the State of California for the County of San Diego affirmed the jury's verdict.

Petitioner's requests for a rehearing and an application for certification to the California Court of Appeal, Fourth Appellate District, Division One were denied on June 14, 1977.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28, United States Code section 1257(3).

QUESTIONS PRESENTED

I. Is petitioner precluded from raising the issue of constitutional protection?

II. Is Issue Number 14 of *Finger* protected by the First and Fourteenth Amendments to the United States Constitution?

III. Is California Penal Code section 311.2(a) consistent with the scienter requirement of *Smith v. California* and *Mishkin v. New York*?

IV. Is petitioner's conviction based on evidence consistent with the scienter requirement of *Smith v. California* and *Mishkin v. New York*?

V. Is petitioner's conviction unconstitutional for lack of evidence of scienter?

VI. Was petitioner denied due process of the law by reason of the judge's comment?

STATEMENT OF THE CASE

On August 30, 1975, petitioner's jury trial commenced. During voir dire examination by petitioner's counsel, the judge made the following comment in response to a juror's reluctance to serve due to her negative feelings about the material in question:

> We have to select a group of a cross section of society. Everybody is entitled to be represented. The People are entitled to a fair trial and so are the defendants, so don't feel badly if you have opinions and express those opinions because we want to make sure you can ignore your personal feelings and your personal experiences and opinions and decide this case solely on the evidence here and the law as stated to you by the Court.
>
> So don't feel badly because you happen to disapprove of this type of magazine.
>
> I think that, by and large, most people do. I don't know. I don't know most people –

The People's evidence was presented through the testimony of San Diego Police Officer Howard Goldly, the defendant's store clerk Donna Ingalls, and the defendant's store manager James Chapman.

The evidence indicated that in 1975, petitioner came to San Diego to open adult bookstores. Petitioner met with Officer Goldy and indicated that he, petitioner, would move to San Diego or come to San Diego on a weekly basis in order to run his business personally. Additionally, petitioner disclosed that he would have the sole financial interest in the business.

After his discussion with Officer Goldy, petitioner applied for and received a city business license. The license identified petitioner as the sole owner and operator of an adult bookstore located at 4281 University Avenue, San Diego.

On February 24, 1976, Officer Goldy went to petitioner's store at the above address. Signs in front of the store read: "World's Largest Book Shop," "Adult Section," "Adult Books," and "Movies." Inside, the store was divided into two sections. The larger portion of the store's interior was designated as the adult section. A sign was posted at the front of this section which stated: "No one under the age of 18 allowed." The magazines in this section were in plain view and displayed on shelves. The covers of many of the magazines were in color and depicted various sexual acts such as oral copulation and intercourse in graphic detail.

Issue No. 14 of *Finger* (hereinafter referred to as *Finger*) was on a shelf in plain view. The magazine contains numerous pictures and drawings depicting males and females in various sexual acts including group sex, defacation, masturbation, urination, urination into the mouth of another, insertion of hands and feet into the anus of another, intercourse with a chicken, bondage, necrophelia, and homosexual acts including oral copulation and anal intercourse. Officer Goldy purchased this magazine from the store clerk.

Mr. James Chapman was the clerk-manager at the store. He saw petitioner in the store at least three or four times during the course of his employment. Chapman's responsibilities at the store did not involve the ordering of any materials for the

store. Chapman also testified that petitioner signed the payroll checks.

The petitioner presented no evidence in his own behalf.

The Judge's instruction to the jury included the following:

> I have not intended by anything that I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts on any questions that were submitted to you or that I believed or disbelieved any witness.
>
> If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

On August 31, 1976, the jury returned a verdict of guilty of California Penal Code section 311.2(a).

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE DENIED

There is no merit to petitioner's claim that *Finger* is protected by the First and Fourteenth Amendments to the United States Constitution. The issue of whether *Finger* is obscene was presented to the jury under state statutes and instructions by the court which complied fully with the provisions of the United States Constitution. Further, the Appellate Department of the Superior Court correctly concluded that the comment by the trial judge was not a violation of petitioner's due process rights to a fair trial and an impartial judge.

ARGUMENT

I

PETITIONER IS PRECLUDED FROM RAISING THE ISSUE OF CONSTITUTIONAL PROTECTION.

Only issues which properly arise in the record and which have been urged and briefed below may be presented by petitioner for review, *California v. Taylor,* 353 U.S. 553, 557 n. 2, 1 L.Ed.2d 1034, 1037 n. 2, 77 S.Ct. 1037, 1039 n. 2 (1957), unless there are exceptional circumstances. *Lawn v. United States,* 355 U.S. 339, 363 n. 16, 2 L.Ed.2d 321, 337 n. 16, 78 S.Ct. 311, 324 n. 16, *rehg. denied,* 355 U.S. 967, 2 L.Ed.2d 542, 78 S.Ct. 529 (1958).

In the instant case, petitioner did not raise the question of whether *Finger* is protected by the First and Fourteenth Amendments to the United States Constitution (see p. 7 of Petitioner's Brief), nor does he state in his brief any exceptional circumstances which entitle him to raise this issue now. Accordingly, petitioner's request for an independent review by this Court should be denied.

II

FINGER IS UNPROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

If this court grants petitioner's request for an independent review, it is clear that *Finger* is unprotected by the First and Fourteenth amendments to the United States Constitution.

These amendments have never been treated as absolutes, and this court has held that obscene material is unprotected by the First Amendment. *Miller v. California,* 413 U.S. 15, 37 L.Ed.2d 419, 93 S.Ct. 2607 (1973); *Roth v. United States,* 354 U.S. 476, 1 L.Ed.2d 1498, 77 S.Ct. 1304 (1957).

In determining whether or not a matter is obscene, a jury does not have unbridled discretion. This Court may independently test the material for the existence of each of the three obscenity elements (prurient-appeal, patent-offensiveness, and social value) because these elements are questions of constitutional fact. *Jenkins v. Georgia,* 418 U.S. 153, 41 L.Ed.2d 642, 94 S.Ct. 2750 (1974); *Kois v. Wisconsin,* 408 U.S. 229, 33 L.Ed.2d 312, 92 S.Ct. 2245 (1972). Such a test will find that each element is indeed present.

Prurient Appeal

The dominant theme of *Finger* taken as a whole is explicitly aimed at a shameful, or morbid interest in nudity, sex, or excretion. It containes numerous pictures and drawings depicting males and females in various sexual acts including group sex, defaction, masturbation, urination, urination into the mouth of another, insertion of hands and feet into the anus of another, intercourse with a chicken, bondage, necrophilia, and homosexual acts such as oral copulation and anal intercourse.

Additionally, the text which has been inserted with these photographs and drawings is an unsuccessful attempt to dignify what is clearly intended to be sold as hard core pornography. The text is a sham attempt to cloak commercial pornography in the guise of legitimacy. As such, the theme of pruriency remains dominant throughout the magazine.

Patent-Offensiveness

This Court has held that no one will be subject to prosectuion for the sale of obscene materials unless these materials depict or describe patently offensive hardcore sexual conduct. *Jenkins v. Georgia, supra.* Furthermore, this Court has provided examples of what is patently offensive hardcore sexual conduct: representations or descriptions of (1) ultimate sexual acts, normal or perverted, actual or simulated; (2) masturbation; (3) excretory functions; and (4) lewd exhibition of the genitals. *Miller v. California, supra.*

Finger is patently offensive because it contains representations and descriptions of these same hardcore sexual acts.

Social Value

The First Amendment is designed, *inter alia,* to protect minority or unpopular views, tastes, opinions, ideas or desires; particularly in the area of literature, art, politics, and science. *Miller v. California, supra.*

Petitioner does not claim now nor did he offer any evidence at trial to show that *Finger* has any social value. Both the written and pictorial representations are not intended to convey literary, artistic, political or scientific ideas or messages, but rather to "dress up" material which is sold and distributed for its obscenity.

Each element of obscenity is present in *Finger.* Accordingly, *Finger* is unprotected by the First and Fourteenth Amendments to the United States Constitution.

III

CALIFORNIA PENAL CODE SECTION 311.2(a) IS CONSISTENT WITH THE SCIENTER REQUIREMENT OF *SMITH V. CALIFORNIA* AND *MISHKIN V. NEW YORK.*

Without evidence of scienter, a book seller may not be held criminally liable for the sale of obscene matter. To hold otherwise would restrict the distribution of both constitutionally protected literature as well as obscene literature. *Smith v. California,* 361 U.S. 147, 4 L.Ed. 205, 80 S.Ct. 215 (1959), *rehg. denied,* 361 U.S. 950, 4 L.Ed.2d 383, 80 S.Ct. 399 (1960); *Mishkin v. New York,* 383 U.S. 502, 16 L.Ed.2d 56, 86 S.Ct. 958, *rehg. denied,* 384 U.S. 934, 16 L.Ed.2d 535, 86 S.Ct. 1440 (1966). A book seller, however, may be well aware of the nature of a book he sells and its appeal without opening its cover, or in a true sense having knowledge of the book (concurring opinion of Justice Felix Frankfurter in *Smith v. California, supra*).

California Penal Code section 311.2(a) embodies the foregoing precept by making scienter, *i.e.,* knowledge, a required element of every obscenity case. The term "knowingly" is defined in California Penal Code section 311(e): " 'Knowingly' means being aware of the character of the matter or live conduct." This definition is consistent with *Mishkin* which held that to establish scienter, the evidence must show that the defendant was aware of the character of the material.

On page seven of his brief, petitioner cites the instruction given to the jury on the word "knowingly": " 'Knowingly' means being aware of the *contents* of the matter. It does not

mean knowledge that the matter was legally obscene." Substitution of the word "contents" for the word "character" creates no inconsistency. If anything, this change created a heavier burden for the prosecution in proving scienter. Moreover, petitioner did not raise this instruction as error below and is precluded from doing so now. *California v. Taylor, supra.*

IV

PETITIONER'S CONVICTION WAS BASED ON EVIDENCE CONSISTENT WITH THE SCIENTER REQUIREMENT OF *SMITH V. CALIFORNIA* AND *MISHKIN V. NEW YORK.*

The evidence to support a finding of scienter in obscenity cases may be either direct or circumstantial. *Mishkin v. New York, supra.* The required degree of circumstantial evidence will depend on the facts of each obscenity case. Accordingly, petitioner's request that this court compile a exhaustive catalogue of such circumstances or formulate a uniform test in determining scienter is unrealistic, if not impossible.

Furthermore, the California obscenity cases which have decided the question of sufficient circumstantial evidence of scienter on the part of a bookstore owner are consistent with the requirements of *Smith* and *Mishkin.*

In *People v. Andrews,* 23 Cal.App.3d Supp. 1, 100 Cal.Rptr. 276 (1972), as in *Smith,* ownership alone was held to be insufficient circumstantial evidence of scienter on the part of a bookstore owner. In *People v. Pinkus,* 256 Cal.App.2d Supp. 941, 63 Cal.Rptr. 680 (1967); *People v. Kuhns,* 61 Cal.App.3d

735, 132 Cal.Rptr. 725 91976), as in *Mishkin,* a bookstore owner's scienter was established by ownership plus various circumstantial evidence, *e.g.* payments by the owner of bills and payroll, signs on the premises indicating the character of the material for sale, pictures on the covers of magazines inside the store, displays of the material in plain view, and visits to the bookstore by the owner.

While the circumstantial evidence establishing scienter necessarily varies from case to case, the requirement of scienter remains constant: Does the evidence amply show that the defendant was aware of the character of the material and that his activity was not innocent but calculated purveyance of filth? *Mishkin, supra,* at 511-512. In light of this requirement, and the California cases noted above, petitioner's conviction is consistent with the scienter requirement of *Smith v. California, supra*; *Mishkin v. New York, supra.*

V

PETITIONER'S CONVICTION IS NOT UNCONSTITUTIONAL FOR LACK OF EVIDENCE OF SCIENTER.

Evidence of scienter does not have to establish a defendant's knowledge of the actual contents of the alleged obscene matter, but rather his awareness of the character of the material. *Hamling v. United States,* 418 U.S. 87, 41 L.Ed.2d 590, 94 S.Ct. 2887 (1974).

In the instant case, petitioner's awareness of the character of *Finger* was established, *inter alia,* by the following

circumstantial evidence: (1) petitioner applied for and was granted a business license as owner and *operator* of the adult bookstore; (2) he indicated that he would have the sole financial interest in the business; (3) he indicated his intent to run the business himself, and on the date of the offense his business included the bookstore where *Finger* was sold; (4) he personally hired an employee to manage the store; (5) he personally signed the payroll checks to both the manager and the clerk of the bookstore; (6) none of the employees of the store ordered any of the materials for sale; (7) signs outside the store advertised "Adult Material," and a sign inside the store stated "No One Under 18"; (8) *Finger* as well as other magazines depicting explicit sexual acts, were in plain view on the shelves in the bookstore; and (9) he had met personally with the bookstore manager at the bookstore at least three or four times.

The foregoing evidence established petitioner's awareness of the character of *Finger* as well as his calculated rather than innocent purveyance of it. The jury did not permit petitioner to hide behind the guise of absentee ownership. Accordingly, petitioner's conviction did not violate the due process clause of the Fourteenth Amendment.

VI

PETITIONER WAS NOT DENIED DUE PROCESS OF THE LAW BY REASON OF THE JUDGE'S COMMENT.

The California Constitution expressly permits the court to ". . . make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for

the proper determination of the case." California Constitution Article VI, Section 10. This judicial right of comment has received statutory enactment in California Penal Code sections 1093 and 1127.

The judicial power to comment on the evidence, however, is not arbitrary and has inherent limitations. A judge may not withdraw material from the jury's consideration or distort the testimony of witnesses. Similarly, a judge's comments should be temperately and fairly made and should not assume the complexion of partisan advocacy. *People v. Flores,* 17 Cal.App.3d 579, 587, 95 Cal.Rptr. 138, 143 (1971).

As long as a judge's comments do not usurp the exclusive provence of the jury to decide the facts and the credibility of witnesses, the comments are within the bounds of propriety. *People v. Friend,* 50 Cal.2d 570, 577, 327 P.2d 97, 101 (1958). Beyond these obvious limitations, "No hard and fast rule determinative of what a trial judge may or may not say to a jury in commenting on the evidence and the credibility of witnesses can be laid down." *People v. Ottey,* 5 Cal.2d 714, 724, 56 P.2d 193, 197 (1936); *People v. Flores, supra,* 95 Cal.Rptr. 138, 141 (1971).

It is impossible to generalize as to what particular comments should or should not be permitted in all criminal cases. Each case must necessarily turn upon the context and extent of the comments and the peculiar circumstances under which comments are made. *People v. Ottey, supra.* Nevertheless, within the bounds of propriety, the court may exercise its own discretion with respect to what comments it will make. The trial court is the best judge of the extent of the comments and should be free to exercise its discretion in accordance with its own judgment. *People v. Ottey, supra.*

In the instant case, the judge's comment was intended to reassure the jury and to foster open and honest answers to the voir dire questions. The court made numerous statements to the prospective jury panel members in an attempt to put them at ease and enable them to effectively answer questions of a delicate and sensitive nature. In essence, the judge instructed the jurors not to feel badly regarding their personal opinions and to express any such feelings. The court asked the jurors to express any disapproval of this type of magazine so that the extent of and basis for the disapproval could be examined by both counsel. The court's statement did not express the opinion that the magazine was obscene, nor that petitioner had knowledge of its character; nor was the comment directed at any evidence or element of the case. The statement was not directive in nature nor was it part of the charge to the jury.

Furthermore, any possible prejudice was cured by the instruction given to the jury to disregard all statements made by the court during the trial. (Reporter's Transcript, 332.) Accordingly, petitioner was not denied due process of law by reason of the judge's comment during voir dire.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Dated: November 2, 1977

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